FILE COPY

Office Supreme Court, U.S.
FILED
JAN 23 1960
JAMES R. BROWNING, Clerk

In the United States Supreme Court

OCTOBER TERM, 1959

No. 655

W. O. MURRELL, SR.,

Petitioner,

-vs-

HOUSTON WHITE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

W. O. MURRELL, SR.
16 So. Newman Street
Jacksonville, Florida

In Proper Person.

INDEX

	Page
JURISDICTION	2
QUESTIONS PRESENTED	2
STATEMENT OF THE CASE	3
BASIS OF LOWER COURT'S JURISDICTION	5
REASONS FOR GRANTING OF THE WRIT	6
CONCLUSION	18
CERTIFICATE OF SERVICE	18

AUTHORITIES CITED

Commonwealth v. Stalone, 281 P. 41; 126 Atl. 56	14
Ex Parte Biggers, 95 So. 769	11
Ex Parte Senior, 37 Fla. 1, 19 So. 652	10
Gordon v. Commonwealth, 133 SW 206, 208; 141 Ky. 461	9
Grock v. United States, 53 App. DC 146, 289 F. 544	13
Holden v. Hardy, 18 S. Ct. 383, 169 U.S. 366, 42 L.Ed. 780	15
Kelly Salvage Co. v. Neel, 262 SW 189	12

AUTHORITIES CITED—Continued

	Page
McDuff v. Detroit Evening Journal, 84 Mich. 1, 47 NW 671	17
Murrell v. United States, 253 F.2d 267	8
Maryland Casualty Co. v. Reed, 76 F.2d 30	17
Nain Antoun Zebouni v. United States of America, 226 F.2d 826	18
People v. Johnson, 219 Cal. 72; 25 F.2d 408	8
Ringlander v. Star Co., 90 N.Y.S. 772, 776; 98 APO Div. 101	14
Reetz v. State of Michigan, 23 S.Ct. 390, 188 U.S. 505, 47 L. Ed. 563	14
Sprinkle v. Davis, 111 F.2d 925	12
Tennessee-Brooks v. State, 187 Tenn. 67; 213 SW 2d 7, Cert den. 340 U.S. 834, 95 L.Ed. 614, 71 S.Ct. 21	13
U.S. v. Ah Kee Eng, 241 F.2d 157	11
U.S. v. Shercey, D.C. N.Y. 1949, 9 F.R.A. 394. Affirm 182 F.2d 416	10
Wilson v. Joughin, 141 So. 182	10

OTHER AUTHORITIES

Webster's New Twentieth Century Dictionary, page 1044	8
Title 28, U.S. Code, Sec. 1254 or 317(a)	2.
5th & 14th Amendments to Constitution of the United States	3

In the United States Supreme Court

OCTOBER TERM, 1959

No.

W. O. MURRELL, SR.,

Petitioner,

-vs-

HOUSTON WHITE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE, THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

W. O. Murrell, Sr. brings this petition for writ of certiorari and represents and shows as follows:

That the judgment of the Court sought to be reviewed is a final judgment in that certain cause wherein petitioner,

W. O. Murrell, Sr., was appellant, and respondent, Houston White, was appellee, lately pending in the United States Court of Appeals for the Fifth Circuit. That the said final judgment is attached hereto and marked Appendix-A-1 (R. 308), and that the opinion upon which said judgment was issued is hereto attached and marked Appendix A-2 (R. 300). That said opinion is not yet reported.

JURISDICTION

The grounds upon which the jurisdiction of the Supreme Court of the United States is invoked is that the United States Court of Appeals for the Fifth Circuit has so far departed from the accepted and usual course of judicial proceedings, or has so far sanctioned such a departure by the lower courts, and has deprived the petitioner of his constitutional guarantee of due process of law, as to call for an exercise of this Court's power of supervision, and jurisdiction to issue this writ of certiorari rests in Title 28, U.S. Code, Section 1254 or 317(a).

The date of the judgment sought to be reviewed is November 3, 1959 (Appendix A-1), and was entered on the same day (R. 308), and the opinion has not yet been reported. That the date of filing petition for rehearing was November 25, 1959 (R. 309). The rehearing was denied on December 15, 1959 (R. 313; Appendix A-10).

QUESTIONS PRESENTED

The questions presented are:

1. Where the Court was induced in a civil case to (a)

accord extra-special recognition to lay witnesses for the plaintiff, in the presence of the jury; (b) compliment plaintiff at the expense of the defendant; (c) instruct defendant to "shorten it up some by not objecting too much"; (d) threaten to intervene; (e) adjudge defendant guilty of a criminal contempt, in the presence of the jury, and order him into the custody of the Marshal, thereby coercing and forcing the defendant to yield and submit to anything the judge might say or do for fear of reprisal by the Court; was the defendant accorded a fair trial and due process in accordance with the constitutional guarantees of the 5th and 14th Amendments of the Constitution of the United States?

2. Whether or not a person who is not in contempt of court, but summarily adjudged so in the presence of a jury, in a civil case, is deprived of a fair trial and due process of law under the 5th and 14th Amendments of the Constitution of the United States, for stating in response to a question, "that is a lie".

STATEMENT OF THE CASE

Plaintiff brought suit for attorney's fees "allegedly" due him for legal services rendered defendant, a lawyer. When the trial began, the defendant asked the Court to invoke the rule (to exclude all witnesses from the courtroom during the trial). Plaintiff moved that two of his witnesses (two Judges from the State Courts of Georgia) be excused from the rule.

The Court denied the motion and stated:

> "The Court: Marshal, will you find a comfortable place for these distinguished judges who are here as witnesses. My chambers are close by and they may use

my chambers until they are called". (R. 10, 11 and 12)

During the course of the trial the Court complimented plaintiff at the expense of the defendant as follows:

> "The Court: Well, the presumption is you are in good standing, isn't it?" (R. 125)

> "The Court: But your reputation for being a good lawyer -- I have no doubt you enjoy a good reputation in that --" (R. 126)

And the Court repeated:

> "I think we would presume you are in good standing with the Bar". (R. 126)

And again repeated:

> "Shouldn't we presume you are in good standing?" (R. 126)

And, during the course of the trial, the Court admonished defendant:

> "You can shorten it up some by not objecting too much". (R. 135)

And threatened to intervene:

> "The Court: You are not going to help this jury. Eventually you are going to have the Court intervene unless you conduct this investigation in an orderly fashion." (R. 65)

Ultimately, the Court adjudged defendant in contempt while he was on the witness stand and on cross-examination (R. 247), when his response to an ambiguous and ambulatory question was, "That is a lie". This action was summary, and petitioner could only, in obedient subservience and humility, apologize to an already hostile judge for fear of further reprisals; and dared not, from fear, object or otherwise state any position contrary to the stormy judicial weather which defendant encountered; and defendant was thereby made the subject of a war of nerves -- a cold war -- by the Judge, in which defendant could do nothing other than surrender.

The case was submitted to the jury by the trial court, which returned a verdict for the plaintiff for $9,700.00, and judgment was ordered to be entered against the defendant in that amount, and costs (R. 281)

Defendant made a motion for a new trial (R. 287-289), which was subsequently denied (R. 290), and defendant appealed (R. 291).

On the 6th day of February, 1959, petitioner filed his appeal to the Court of Appeals, and on the 3rd day of November, 1959, judgment affirming the lower court was rendered. By petition for rehearing, appellant sought to call to the Court's attention the facts constituting the bias and prejudice manifested by the trial judge, which petitioner contends deprived him of due process and a fair hearing. This was denied (Appendix A-10), and this petition for writ of certiorari follows.

BASIS OF LOWER COURT'S JURISDICTION

The basis of jurisdiction of the lower court (United States

District Court, Southern District of Florida), a civil action, was bottomed upon the amount in controversy exceeding the sum of $3,000.00, exclusive of interest and costs, and diversity of citizenship between plaintiff and defendant; the defendant being a resident of the State of Florida, and the plaintiff a resident of the State of Georgia.

REASONS FOR GRANTING OF THE WRIT

It appears that the United States Court of Appeals for the Fifth Circuit has rendered an opinion which is in conflict with both applicable decisions of this Court and decisions of other courts of appeal.

The first question presented arose when the Court threatened to intervene without any just cause and openly stated before the jury that defendant was not going to help the jury (R. 64-65), and through the contempt proceedings herein set forth.

When discussing, on cross-examination, plaintiff's claim that he discovered the true prosecutors of defendant's disciplinary proceeding, the following occurred.

"Q I don't want to belabor the point.

"A You see, you had these people identified as the National Association of Casualty and Surety Underwriters.

"Q That is right.

"The Court: You are not going to help this jury. Eventually you are going to have the Court intervene unless

you conduct this investigation in an orderly fashion.

"Mr. Murrell: I was just trying to get him to answer the question; and he did answer". (R. 64-65)

Thus, the treatment of defendant when a valid objection was made and the Court, in the presence of the jury, said:

"The Court: You can shorten it up some by not objecting too much. I agree with you it is not particularly material --" (R. 135)

And again, the Court said:

"The Court: Counsel, you don't have to strain your emotions here. Let's finish this trial in an orderly fashion and try to reach the end of it as soon as we reasonably can." (R. 240-241)

It is manifest from these statements in the presence of the jury that defendant had encountered stormy judicial weather. Plaintiff, following the pattern of his conduct to prejudice the defendant before the jury and scuttel his defense, propounded the irregular, ambiguous and ambulatory question as follows:

"Q (By Mr. White) Now, during the course of the case you told me how important it was to you to keep from being disbarred many, many times, didn't you, and the reason was not only you wanted to save your professional life but because you were afraid that the Civil Communications Commission would deny your right to a television station in Orlando?" (R. 246)

Whereupon, the defendant stated:

"That is a lie." (R. 247)

This question and answer were made the subject of the argument in appellant's brief filed in the United States Court of Appeals for the Fifth Circuit, which is reported in 253 F.2d 267.

There is no case where an appellate court on appeal held defendant's language to be contemptuous; there is but one single case where a trial judge held an attorney in contempt for the language used by him. This was not a witness on the witness stand, and the question was never raised, argued or passed upon as to whether it constituted contempt. There also was not a reply to a contemptuous question propounded. *People v. Johnson*, 219 Cal. 72; F. 2d 408.

Defendant deeply feels there was no contempt. It is to be noted that the basis of the contempt proceeding was the question propounded by plaintiff, while defendant was a witness on his own behalf, using the single word "lie".

Investigation of the word "lie" in our modern English language properly defined, comes from Webster's New Twentieth Century Dictionary, page 1044:

> "lie, n. 1. a false statement or action especially one made with intent to deceive.
>
> 2. anything that is meant to give a false impression."

The trial court failed to recognize the word was neither profane, vulgar, obscene, nor a curse word as contended in Murrell v. United States, infra. There it was stated the word is used in newspapers daily, heard on the radio and television frequently, appears in cross-word puzzles, and is a word about which lyrics and songs are written; it was used by

Shakespeare and other great authors in highly valued literature. The identical language was received and accepted by at least 25,000,000 Americans in their homes as recently as June 23, 1959. The scene was (Red Skelton) playing the part of a boxer, McPugg, helping to train Wentworth (Vincent Price), while Wentworth was speaking to Diane Crawford (Valorie Powers). The script follows:

> "Wentworth (speaking to Powers): He is an imbecile.
> "Red Skelton (as McPugg): That's a lie. I'm a heavyweight."

As used by defendant, the word could be no more a contempt than its synonyms, fib, falsehood, story, misrepresentation or untruth; and upon reading the question and answer, it only challenged the irregular, ambiguous, ambulatory, disjunctive phrases and clauses, and the many subjects of the connecting statements contained in what purported to be a question by plaintiff. It was directed only to the phraseology and cast no reflection upon the court, nor did it challenge the morals of anyone; and specifically absent was any intent on behalf of defendant to disrupt or reflect upon the court. There was no prefix, and without some connotation being supplied, it was not contemptuous, nor intended to be, but it was the only proper answer that defendant could give.

The question of what is contempt is briefed in the case of *Murrell v. United States, infra.* And further citation of authority follows:

> "A criminal contempt consists of conduct which amounts to an obstruction of justice tending to bring the Court in disrepute."
>
> *Gordon v. Commonwealth*, 133 SW 206, 208; 141 Ky. 461.

And,

> "arising out of acts, statements and willful attack upon the administration of justice and attempt to sabotage the function of the Federal judicial system, and the misconduct must be of a grave character."
>
> *U.S. v. Shercey*, D.C: N.Y. 1949, 9 F.R.A. 394, affirm 182 F.2d 416.

The following authorities are of value here:

> "The following language taken from People ex rel Hackley v. Kelly, 24 N.Y. 74, -- a contempt proceeding -- is expressive of our view on the subject, viz: 'But this rule is, of course, subject to the qualification that the conduct charged as constituting the contempt must be such that some degree of delinquency or misbehavior can be predicated on it; for if the act be plainly indifferent or meritorious, or if it be only the assertion of the undoubted right of the party, it will not become a criminal contempt by being adjudged to be so.'"
>
> *Wilson v. Joughin*, 141 So. 182.

Therefore,

> "if the matters complained of in the contempt proceeding do not in law constitute contempt of court, an adjudication that they do constitute contempt does not make it contempt --"
>
> *Ex Parte Senior*, 37 Fla. 1, 19 So. 652.

> "A circuit judge is expected to be a man of ordinary firmness of character; and, if the matter complained

of as constituting contempt, when fairly interpreted does not have a reasonable tendency to degrade or to embarrass or hinder such a judge in performance of his duty, or to affect a mind of reasonable fortitude, it is not a criminal contempt for which imprisonment may be lawfully adjudicated, particularly when an intent to offend is denied on oath.

"Generally it is the nature and reasonable tendencies of the matter complained of that controls; and, if the matter is of doubtful tendency or might or might not be considered ambiguous as to its general or specific purpose, the circumstances under which the thing was done or in which its consequences are to appear, may be considered in determining the reasonable tendency of the matter to affect judicial authority or dignity."

Ex Parte Biggers, 95 So. 769.

Moreover, the trial judge occupies a high position. The jury has great respect for him. They can be easily influenced by the slightest suggestion coming from the Court, whether it be a nod of the head, a smile, a frown, or a spoken word. It is therefore imperative that the trial judge shall conduct himself with the utmost caution in order that the unusual power he possesses shall not be abused.

"... The trial judge -- must not forget that the jury hangs on his every word and is most attentive to any indication of his view of the proceeding. Thus repeated indications of impatience and displeasure of such nature to indicate that the Judge thinks little of counsel's intelligence and what he is doing are most damaging to a fair presentation of the defense."

U.S. v. Ah Kee Eng, 241 F.2d 157.

In a similar case, the Court of Appeals for the Fourth Circuit, speaking through Judge Soper, in the case of *Sprinkle v. Davis*, 111 F.2d 925 said:

> "The judge of his own motion thereupon ruled that an admission in a former trial could not be introduced, stating that he had explained a half dozen times that the record of the previous trial could be referred to only to show that a witness had then given testimony different from that offered by him at the second trial. The judge charged defendant's counsel with constant breaches of the rule, and declared that he would impose a fine upon them if the practice continued. This statement we think was improper and highly prejudicial."

Also in the case of *Kelly Salvage Co. v. Neel*, 262 SW 189, it is stated:

> "The court has no right or authority to enact the part of an advocate in the case in the guise of 'getting something straightened out in his mind'. In the straightening out process, the court dealt such deadly blows to the appellant that its defense was destroyed before the jury."

It therefore follows that the condemnation of defendant before the very jury passing upon his credibility and ordering him into the custody of the Marshal, as witnessed by them, was prejudicial and the rebuke was allowed to stand before the jury until the jury was about to retire, when the defendant, harrassed and embarrassed by fear and force, surrendered. Defendant dared not do otherwise.

So the contempt proceeding was allowed to be fixed in the mind of the jury from the time it occurred, and any instruction after all other instructions were given could not have been effectual. See City of Chicago v. Cuna, 160 NE 562. Indeed, the calling of attention to the occurrence again was more disastrous than helpful. One has but to imagine defendant's plight as he sat before the jury before whom he was condemned (and for aught they knew, still in the custody of the Marshal), the very jury passing upon the issue of his credibility.

Defendant meant no harm by his answer to plaintiff's question, and no other explanation could adequately catagorize this immaterial conglamoration of language in the strength which it deserved. This directly caused defendant's shameful and humiliating position; it was brought on by the contempt proceeding which discredited, disparaged and lowered defendant in esteem and exemplified the systematic hostility carried on in the presence of the jury by plaintiff and the trial judge.

The modern view respecting treatment of counsel is illustrated by a passage from *Grock v. United States*, 53 App. DC 146, 289 F. 544, where the Court said:

> "It is an important rule that an attorney at law appearing in open court in the trial of a case is entitled to such treatment from the court that the interest of his clients may not be prejudiced. That is not a matter of indulgence, but of right."

It is also held in the case of *Tennessee-Brooks v. State*, 187 Tenn. 67, 213 SW 2d 7, cert. den. 340 U.S. 834, 95 L. Ed. 614, 71 S. Ct. 21:

"This course of disparagement of counsel and of the defense, naturally conveyed to the jury, was not easily effaced. The jurors were likely influenced by the actions of the judge and the feeling manifested in his words and rulings during the trial."

Also:

"Any indication that the judge condemns the language or conduct of one of the lawyers or his counsel is usually reflected in the jury box."

Commonwealth v. Stalone, 281 P. 41; 126 Atl. 56.

It is therefore submitted there was no contempt, and the handling of the stiuation by the court was improvident, and took from defendant his constitutional guarantees of due process.

"Due process of the law' includes every step from summons to judgment, and, if a party is deprived of any right usually accorded to others, it is not 'due process of law'".

Riglander v. Star Co., 90 N.Y.S. 772, 776; 98 APO Div. 101.

"Due process of law' requires that a person shall have reasonable notice and opportunity to be heard before an *impartial* tribunal before any binding decree or order can be made affecting his rights to liberty or property.

See *Reetz v. State of Michigan*, 23 S. Ct. 390, 188 U.S. 505, 47 L. Ed. 563.

"Due process of law implies at least a conformity with

the natural and inherent principles of justice."

Holden v. Hardy, 18 S. Ct. 383, 169 U.S. 366, 42 L. Ed. 780.

The court's acknowledgment of plaintiff's witnesses as "distinguished judges" and his solicitous invitation to "use my chambers" could have no effect than to set them apart from any other witness called to testify in the trial.

This was in the presence of the jury, over the objection of the defendant. There in the courtroom were these two gentelmen, who voluntarily came to Florida with the plaintiff as nothing more than mere "lay" witnesses; however, the court, seemingly struck by their visitation, in the presence of the jury sworn to try the case, recognized them as "distinguished judges" and so identified them before the jury and further offered these witnesses the use of his chambers. (R. 10, 11 and 12)

It is doubtful that this "prelude" has ever been paralelled in the history of jurisprudence.

These witnesses were present in open court after the jury had been empanelled and sworn and in the presence of the jury were identified by the trial court as "these distinguished judges", and hence the order of the trial court to segregate them from other witnesses by use of the court's chambers (these witnesses were present to testify only as to the theoretical value of plaintiff's services), but the court irrevocably placed the court's stamp of approval on them, and the surrendering of his chambers to them inevitably led the jury to the inescapable conclusion that they were closely associated with, if not a part of, the court when they received that signal honor. This was the deliberate intention of the

plaintiff, for plaintiff well knew that would be the effect it would have; hence their presence. These witnesses were not witnesses where the venue of this cause lay, and even before the trial started, defendant was confronted with the court's hospitable recognition of the gentlemen in the presence of the jury, which is what the plaintiff expected and all plaintiff hoped for, especially when the court manifested concern about their comfort.

Moreover, when plaintiff attempted to show what a good lawyer he was, the following colloquy took place:

> "The Court: Well, the presumption is you are in good standing, isn't it?" (R. 125)
>
> "The Court: But your reputation for being a good lawyer -- I have no doubt you enjoy a good reputation in that --" (R. 126)

And the Court repeated:

> "I think we would presume you are in good standing with the Bar."

And again repeated:

> "Shouldn't we presume you are in good standing?" (R. 126)

Thus the court, in the presence of the jury, recognized plaintiff as a good lawyer, and plaintiff again led the court into error by complimenting the plaintiff at the expense of the defendant, and recognized before the jury that he had no doubt that plaintiff enjoyed a good reputation in *that*.

All of the foregoing tended to compliment the plaintiff and his witnesses at the expense of the defendant.

> "It is improper for the trial judge to compliment one attorney at the expense of the other or to use language which tends to bring an attorney into contempt before the jury."
>
> *McDuff v. Detroit Evening Journal*, 84 Mich. 1, 47 NW 671.

Not only did the court threaten to intervene (R. 64-65), but the defendant was admonished "not to object too much" (R. 135), and the "coupe de gras" was delivered when defendant was found in contempt. In his unfortunate role as defendant and defense counsel, he was thus relegated to a position of mandatory apology for fear of further expression of prejudice against him, and due process was impossible. The Circuit Court of Appeals overlooked and failed to consider the opinion in the case of *Maryland Casualty Co. v. Reed*, 76 F.2d 30, although they include a portion of it in the opinion, when it failed to *apply* the following language:

> ." -- a trial judge may never abdicate his function, or surrender to counsel the conduct of the trial. It is still his primary duty to oversee and conduct it. Because this is so, he may, and if he fails to, the appellate court may, *though no objection is made and no exception taken*, correct an error or abdication, which has resulted unjustly, by voiding the trial --"

CONCLUSION

There can be no doubt defendant was hampered and embarrassed, his case was weakened and discredited to the point that impartial consideration by the jury was impeded.

For authority, we have to look only to our own Court of Appeals for the Fifth Circuit, where Judge Rives wrote the opinion in the case of *Nain Antoun Zebouni v. United States of America*, 226 F2d 826, which was concurred in by Judge Tuttle and Judge Jones, resulting in a reversal where Judge Simpson merely referred to counsel's action as foolish.

It is therefore respectfully submitted that petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit should be granted.

Respectfully submitted,

WILL O. MURRELL
In Proper Person
16 So. Newnan Street
Jacksonville, Florida.

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing Petition for writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, has been furnished to Houston White, Respondent, Grant Building, Atlanta, Georgia, by mail, this 23rd day of January, A. D. 1960.

_____
Petitioner.

APPENDIX

JUDGMENT.

Extract from the Minutes of November 3, 1959

W. O. MURRELL, SR.,

No. 17701. versus

HOUSTON WHITE.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, W. O. Murrell, Sr.; and the surety on the appeal bond herein, United States Fidelity & Guaranty Co., be condemned, in solido, to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

IN THE
United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 17701

W. O. MURRELL, SR.

Appellant,

versus

HOUSTON WHITE,

Appellee.

Appeal from the United States District Court for the Southern District of Florida.

(November 3, 1959.)

Before HUTCHESON, CAMERON and JONES, Circuit Judges.

HUTCHESON, Circuit Judge: Brought by one lawyer against another, each representing himself in the suit, the action sought recovery of the reasonable and fair value of legal services rendered plaintiff to defendant in a Florida disciplinary proceeding.

Denying that he had employed plaintiff as one of his attorneys, defendant alleged: that he and plaintiff were friends of long standing and plaintiff had volunteered his services; that when it appeared that the hearings in the proceedings would be more prolonged than was anticipated, he had voluntarily offered to pay plaintiff $100 per day for each trial day and expenses; that he had paid all the expenses; and that since there was less than 30 days of actual trial work, he owed plaintiff not in excess of $2800.

The case was tried to a jury on testimony of plaintiff's witnesses which fixed the value of his services from $100 to $150 per day in his office and $200 to $300 per day out of the office, including court work and depositions, while defendant's witnesses fixed the value at $100 per day of every court or trial day. There were differences of opinion also as to the number of court days required and the amount of time plaintiff had given both in and out of court. There was a verdict for the plaintiff not for the $15,000 which plaintiff had claimed nor for the $2800 which defendant had admitted he owed, but for $9700, a sum roughly midway between.

Appealing on a record which shows not a single timely objection made or exception taken to the matters now complained of, defendant is here seeking a reversal in effect on the ground that the several specifications of error[1] put for-

1. These are:

(1) The court erred in giving extra-special judicial recognition to two of the plaintiff's (lay) witnesses.

(2) The court erred in the colloquy with plaintiff, wherein the court conceded in the presence of the jury, plaintiff's reputation for being a good lawyer.

ward present matters showing that, though not made matter of complaint until in the motion for new trial, they were of such nature that they entitled defendant to a reversal.

Thus appellant in the dual role of client and counsel, finds himself here in a position which, as a lawyer of experience and ability, he was and is bound to know makes it most difficult if not impossible for him to obtain the reversal that he seeks. In *Maryland Casualty Co. v. Reid*, 76 F(2) 30, this court, thoroughly canvassing and as fully and correctly stating the principles governing here, at page 33 said:

> "• • • We do not reverse cases for insubstantial error. Abstract inerrancy is hardly possible in the trial of a case in the federal court; it is never an essential to a valid trial there. Jennings v. United States, 73 F(2) 470; Community Natural Gas Co. v. Henley, 54 F(2) 59. Too much is said and done

(3) The court erred in entering judgment where plaintiff's conduct in the case created prejudice.

(4) The court erred in threatening defendant (without any just cause).

(5) The court erred in adjudging defendant guilty of criminal contempt in the presence of the jury.

(6) The court erred in failing to instruct the jury to disregard the contempt proceeding until after the case had concluded and immediately before the jury retired.

(7) The court erred in holding the language used by the defendant to be a contempt.

(8) The court erred in failing to holding plaintiff's question more contemptuous than the answer.

(9) The court erred in repeatedly stating the issue in the presence of the jury, completely overlooking defendant's defense.

(10) The court erred in charging the jury, completely overlooking defendant's defense, failing to mention defendant's defense, and telling the jury defendant claimed plaintiff's services were a gratuity.

(11) The court erred in failing to grant defendant's motion for a new trial.

about too little in the heat and hurry of a trial, for it all to be important. Things of no moment in their transpiring are not made momentous merely by making record of them. Therefore, though the district judge is an administrator primarily charged with the just conduct of the trial, he may not ordinarily be put in error merely because an abberration from trial rules has occurred. It is the duty of counsel by objection to call such threatened or actual departure to the judge's attention, and invoke his corrective action, and, if overruled, to make it appear that prejudice has resulted.

"Ordinarily, if his counsel fails to adequately object, or fails to except to adverse action on his objection, a litigant may not complain of what occurred as error, for he will be treated as having assented to it. On the other hand, a trial judge may never abdicate his function, or surrender to counsel the conduct of the trial. It is still his primary duty to oversee and conduct it. Because this is so, he may, and if he fails to, the appellate court may, though no objection is made and no exception taken, correct an error or abdication, which has resulted unjustly, by voiding the trial. But this will be done only in extreme cases where the judge's error in permitting the trial to get out of bounds, instead of exercising his function to guide and control it, is of such transcendent influence on the course of the trial as that, though not excepted to, justice requires it being noticed and corrected. • • •"

What was there stated has been affirmed and reaffirmed

in theory and in practice in this court and in the federal courts generally, and is embodied in substance in the Federal Rules of Civil Procedure. Accordingly, unless the appellant is able to convince us that some at least of the specifications he now puts forward present an unexpected error of abdiction so glaring that its effect upon the conduct of the trial may not be doubted, he cannot prevail.

From an examination, of the specifications, of what appears in the record, and of what is said about them in the briefs, in the light of this principle, it is quite manifest, we think, that on their face nothing of substance is presented in any of them resembling or suggesting such an error unless it is the specifications Nos. 5, 6, 7 and 8, dealing with, or in some way relating to, the action of the court in adjudging the defendant guilty of contempt in the presence of the jury.

We turn then to the record with respect thereto. While the defendant was on the stand as a witness, near the close of his case, the following occurred:

> Q. (by Mr. White) "Now, during the course of the case you told me how important it was to you to keep from being disbarred many, many times, didn't you, and the reason was not only you wanted to save your professional life but because you were afraid that the Civil Communications Commission would deny your right to a television station in Orlando?"
>
> A. "That is a lie."
>
> The Court: "Counsel, the Court will have to take notice of that—"

Mr. Murrell: "I am sorry. I apologize."

The Court: "—of such contempt committed in the presence of the Court—"

Mr. Murrell: "I am sorry."

The Court: "—and will certify—the Court Reporter has the language—and will impose a fine of one hundred dollars on you, and you will stand committed to the Marshal until it is paid. Proceed." "Marshal, it is about our recess time, anyway. We will recess ten minutes."

(A short recess was then taken)

The Court: "Proceed."

Mr. Murrell: "I would like again to apologize to the Court and Jury. I lost my head. I am awfully sorry. It will not happen again."

The Court: "Very well."

Mr. White: "I believe I will stop, if the Court please, with my cross-examination."

The Court: "Very well." "Witness excused."

After brief testimony in rebuttal, the case was closed, and the colloquy set out in the margin[2] occurred.

---

[2] The Court: "Let me ask counsel whether you have any requested charges under the rule?

Mr. Murrell: "I have requested charges, but I think the issue is simple. It is whether or not there was a contract or not a contract and the reasonable value of the services. That is all. I admit the $2800. I don't know if it would take much."

Mr. White: "If your Honor please, I have no written requested charges. There is only one issue in the case I can see, and that is whether or not my services as here are reasonable services in value and whether or not I made the contract that they claim I did. I don't know of any two issues in the case but

At the conclusion of plaintiff's argument to the jury, the defendant stated:

> "May it please the court, in view of the fact that I feel that this jury understands the issue, no argument is required, and that I tendered $2800, and that is in evidence, I don't want to rehash a dead horse any more."
>
> The Court: "You have no argument then to present to the jury?"
>
> Mr. Murrell: "No, sir."

At the conclusion of the charge, the defendant, to the question whether he had any objection to it, answered:

> "I really have no objection, but I think, in view of the fact that the court did fine me for contempt, you should tell the jury that that should not interfere or have any bearing whatsoever on the case."

---

that. I think as to the first the burden is on me and as to that the burden is on them, as to the contract."

The Court: "Let me ask counsel, what, in the opinion of counsel, will be necessary for you to present by way of argument of the case to the jury."

Mr. White: "How much time, are you asking?"

The Court: "How much time"

Mr. White: "Well, sir, I certainly would not take over half an hour."

The Court: "How much for the defendant?"

Mr. Murrell: "I don't think the case needs any argument. I think the jury understands it fully and completely. If we had been representing clients it might be better, but since I represented myself and Mr. White represented himself, I think they understand it."

The Court: "Let the Court understand whether you want any time allotted to address the jury in connection with the case."

Mr. Murrell: "May I answer that by saying I would like to answer that question if he is going to argue it, I may or may not."

The Court: "Very well. You wish to determine, then, at the end of plaintiff's summation whether you wish to address the jury or not?"

Mr. Murrell: "I can answer it then."

and the Court, in response to the request, so charged.[3]

Upon such a record, it is, we think, too plain for argument that nothing occurred on the trial of the case of which the defendant may now complain as reversible error. He did not ask a mistrial because of the contempt order. He did not complain of it at all. Indeed, he apologized to the court and jury, stating, "I am sorry I lost my head. It will not happen again.", and he later asked for and obtained the requested charge set out in note 3, *supra*.

Under these circumstances, to put the trial court in error with respect to proceedings which defendant himself caused and brought about and as to which he took no exception, but in open court agreed that they had been correctly taken, would be in effect to reward the defandant for the course he deliberately took, of speculating on the chance of a jury verdict and, then, when the verdict had gone against him, of assigning error.

The judgment was right. It is AFFIRMED.

---

[3] The Court: "Gentlemen of the Jury, the Court overlooked to instruct the jury in connection with the unfortunate incident which happened in the courtroom this morning, on account of which the Court adjudged the defendant guilty of contempt. The jury are instructed that you should in no wise let that incident prejudice the defendant's case in your estimation. In other words, the jury should determine the issues in this case and decide the rights of the parties as though that never happened. It has nothing to do with the rights of the defendant in this case, whatever they are according to the law and the evidence in the opinion or judgment of the jury."

A true copy
test: EDWARD W. WADSWORTH
Clerk, U. S. Court of Appeal, Fifth Circuit
New Orleans, Louisiana
(Court Seal) DEC. 30, 1959

ORDER DENYING REHEARING

Extract from the Minutes of December 15, 1959

W. O. MURRELL, SR.,

No. 17701. versus.

HOUSTON WHITE.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

- - - - - - -